# In the Supreme Court of the United States

OCTOBER TERM, 1978

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**No. 79-141**

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WAY BAKING COMPANY,
*Petitioner,*

vs.

INTERSTATE BRANDS CORPORATION,
*Respondent.*

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## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

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### OPINIONS BELOW

The opinion of the Michigan Supreme Court, of which review is sought by the Petitioner, is before this Court as Appendix A to the Petition and is reported at 403 Mich. 479, 270 NW2d 103. The decision was filed on October 2, 1978.

On October 19, 1978 Petitioner filed a Motion for Rehearing in the action, supported by a full Brief. This motion was denied by an order of the Michigan Supreme Court entered November 21, 1978. A copy of the Order appears as Appendix B, of the Petition. Such Order was not reported.

On January 22, 1979 Petitioner filed a Motion for Clarification of Opinion, supported by a full Brief, seeking to have the Michigan Supreme Court reconsider and clarify its opinion of October 2, 1978. This Motion was denied by an Order entered May 2, 1979. A copy of the Order appears as Appendix C, of the Petition. Such Order was not reported.

The opinion of the Michigan Court of Appeals is reported at 79 Mich. App. 551, 261 NW2d 84. A copy of this decision appears as Appendix D, of the Petition.

Copies of the original opinion and judgment of the Circuit Court of Jackson County, Michigan, appear as Appendixes E and F, respectively, of the Petition. Neither was reported.

Upon remand of the case, from the Michigan Supreme Court to the Circuit Court, a Judgment for Respondent was ultimately entered on May 18, 1979, not reported, a copy appearing as Appendix G, of the Petition.

## JURISDICTION

Petitioner would allege jurisdiction under the provisions of 28 USC 1257(3). If jurisdiction possibly exists, it hangs by the thread of a single paragraph in Petitioner's Motion for Rehearing to the Michigan Supreme Court alleging violation of Petitioner's "rights to due process and equal protection of the laws" and by three paragraphs of argument in its Brief in Support of Motion for Rehearing wherein it argued that Petitioner's rights under the U. S. Constitution had been denied by the Court's failure to give notice to the parties prior to reaching a decision and by failing to provide an opportunity for, and to hear, oral argument.



It is submitted that such a reference to an alleged "federal question" is not sufficient to give this Court jurisdiction in a case originally initiated on the basis of State law and which proceeded on that basis through the entire Court system of the State of Michigan, without so much as a suggestion that a federal question was involved. Such a suggestion was raised only after Petitioner had lost its case in the Michigan Supreme Court and it was then and only then that Petitioner felt that it had allegedly been denied due process.

Further, Respondent does not find, in the Petition, sufficient compliance with Rule 23 1(f) of this Court to indicate that any federal question is involved which would justify review, by this Court, of the decision of the Michigan Supreme Court, which decision turned entirely upon the application of State law to a rather straightforward, simple question of whether or not a trademark had been abandoned. Surely, even if jurisdiction could be found to exist, the alleged federal questions belatedly raised by Petitioner are not of sufficient merit or substance, under the provisions of Rule 19 of this Court, to justify the granting of the Petition.

> "The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the Court actively entertains the question and decides it." *Herndon v. Georgia*, 295 U.S. 441, 443 (1935).

The alleged "federal questions" now raised by Petitioner were brought into this case for the first time by its Motion for Rehearing directed to the Michigan Supreme Court. That Court did not entertain and decide the alleged federal question but rather denied the Motion for Rehearing.

Nor can Petitioner be said to have timely raised the alleged federal question by its Motion for Rehearing on the grounds that the decision of the Michigan Supreme Court could not have been anticipated or was unexpected. The Rules under which the Court proceeded (Michigan General Court Rules of 1963) have been in effect for many years and several cases have been decided pursuant to the very provision of which Petitioner now complains (Rule 853.2(4)). See for instance, *In Matter of Kidder*, 395 Mich. 51, 232 NW2d 672 (1975); *People v. Springer*, 396 Mich. 116, 240 NW2d 205 (1976); *American Electrical Steel Co. v. Scarpace*, 399 Mich. 306, 249 NW2d 79 (1976); and also the similar cases of *O'Brien v. City of Detroit Election Commission*, 383 Mich. 707, 179 NW2d 19 (1970); and *People v. Harrington*, 387 Mich. 771, 196 NW2d 129 (1972) decided under similar Michigan Court Rule 852.2 (4)(g) permitting the Supreme Court to enter a final judgment or peremptory order prior to a decision of the Court of Appeals.

Thus, it is submitted that this Court does not have jurisdiction to review the judgment of the Michigan Supreme Court since no substantial federal question was timely raised and decided by that Court and, therefore, the Petition must be denied on jurisdictional grounds alone.

## QUESTIONS PRESENTED

In an effort to persuade this Court that federal questions are allegedly involved, in a very ordinary State Court action for trademark infringement and unfair competition, which ultimately turned on the question of whether Respondent had abandoned the trademark "HOLSUM" in the Lansing, Michigan area, Petitioner has urged, in its first two "Questions Presented" that it was denied due process because (1) Petitioner was not given adequate



notice that a decision on the merits would be rendered on Respondent's delayed application for leave to appeal and (2) Petitioner was not given an opportunity for oral argument before the Michigan Supreme Court. Petitioner's third question presented goes to the factual and legal merits of the case and would seek to have this Court entertain the case for the purpose of overruling the Michigan Supreme Court decision as clearly erroneous.

Therefore, Petitioner actually seeks initially, to attack the Court Rules under which the Michigan Supreme Court has operated for many years and secondly seeks to have this Court review the merits of the case and determine if the lower decision was clearly erroneous.

Accordingly, the "Questions Presented" might be more aptly stated as:

(1) Was the manner of procedure followed by the Michigan Supreme Court, pursuant to its established rules, such as to violate the due process rights of Petitioner;

(2) Was the decision of the Michigan Supreme Court, on the merits of the case clearly erroneous, so as to justify review by this Court.

## CONSTITUTIONAL PROVISIONS AND COURT RULES INVOLVED

While it never appeared in this case prior to Petitioner's Motion for Rehearing to the Michigan Supreme Court, it is now urged that the due process clause of the U. S. Constitution, Amendment XIV, §1 is involved.

Contrary to Petitioner's urging, Respondent does not believe that this case truly involves any federal question; that is, any title, right, privilege or immunity under the Constitution, treaties or statutes of the United States.

The Michigan General Court Rules of 1963 are involved to the extent that Petitioner urges that, by the Michigan Supreme Court following such Rules, it was deprived of due process. The Rule involved is Rule 853 and various subsections thereof.

## STATEMENT OF THE CASE

Respondent, Interstate Brand Corporation, owner of the trademark "HOLSUM" for bakery products in the Lansing, Michigan trade area, by virtue of long use of the mark by it and its predecessor, instituted this action in the Circuit Court of Jackson County, Michigan to enjoin the invasion of the Lansing trade territory by Petitioner, Way Baking Company, using the trademark "HOLSUM" for its bakery products. The case was tried to the Court, without a jury, and both sides made a presentation of witnesses and documentary evidence.

The Court held that Interstate had abandoned the trademark "HOLSUM" in the trade territory, notwithstanding a further finding that Interstate's use of the mark, in the territory, was a defensive use. Accordingly, the complaint was dismissed.

Interstate felt that the decision of the Circuit Court was in error, since it seemed legally improper for the Court to recognize that it was using the mark, on one hand, and, on the other hand, hold that the mark had been abandoned because of non-use. Accordingly, an appeal was taken to the State of Michigan Court of Appeals.

The Court of Appeals, proceeding pursuant to the Michigan General Court Rules of 1963, Section 517.1, stated that it could not say that the findings of fact of the trial Court were clearly erroneous and, therefore, affirmed such findings.



Respondent, Interstate, then proceeded, pursuant to Michigan General Court Rule 853.2(3), to perfect a delayed application for leave to appeal to the Michigan Supreme Court. This took the form of the following pleadings: Motion for Delayed Application for Leave to Appeal; Affidavit in Support of the Motion; Notice of Hearing on the Motion; and Brief in Support of the Motion, which brief fully argued the merits of the case on appeal, pursuant to Michigan General Rules of Court 853.2.

Specifically, said Rule 853.2(1) provides, in pertinent part, that:

> "Application for leave to appeal and brief in support thereof shall be filed in form and manner and proceedings had thereon as provided in subrule 852.2. Each copy of the application for leave to appeal shall be accompanied by a copy of the opinion and order of the Court of Appeals and the opinion, order and findings of the trial court or other tribunal."

It is also important to note that the same Rule 853.2(1) requires that:

> "The filing of a copy of an application for leave to appeal to the Supreme Court with the clerk of the Court of Appeals shall constitute notice to the clerk of the Court of Appeals to forward to the clerk of the Supreme Court the record on file with the Court of Appeals."

Accordingly, a full transcript of the record from both Courts below, together with Exhibits, was furnished to the Michigan Supreme Court at the time of filing Interstate's application for leave to appeal. As a matter of fact, the Office of Clerk of the Michigan Supreme Court has verified the presence of such transcript and exhibits

and stands ready to certify and forward a copy thereof, if requested.

Upon being served with the aforementioned pleadings of Interstate, Petitioner Way, by way of response, then filed, with the Michigan Supreme Court, two documents, namely a "Brief in Opposition to Appellant's Delayed Application for Leave to Appeal" and fully incorporated therein, by reference, the twenty-five page Brief Petitioner had filed with the Court of Appeals and in which the merits of the case on appeal were fully presented and argued.

Specifically, this Brief of Petitioner to the Court of Appeals, copies of which were filed with the Michigan Supreme Court, was a full Brief on all of the issues presented, was specifically advanced as being responsive to Respondent's Brief on Appeal to the Michigan Supreme Court and, as exemplary of the issues treated, set forth a table of contents reading as follows:

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Petitioner's Briefs to the Michigan Supreme Court were dated February 1, 1978. Thus, as of said date the Court had before it full and complete briefs by both parties, presenting and arguing the issues on appeal.

On October 2, 1978 the Michigan Supreme Court decided the matter and, in lieu of granting leave to appeal, and proceeding pursuant to its Rule 853.2(4), reversed the judgments of the lower courts and remanded the case to the Jackson County Circuit Court for entry of a judgment in conformity with its opinion.

Petitioner then filed a Motion for Rehearing and Brief in Support Thereof, which Motion was denied November 21, 1978. After this denial Petitioner filed a Motion for Clarification of Opinion, which Motion was denied May 2, 1979. Subsequently a judgment of the Circuit Court of Jackson County was entered on May 18, 1979 enjoining Way from using the trademark "HOLSUM" in the Lansing area.



## ARGUMENT

### Why the Writ Should Not Be Granted

### Introduction

Petitioner lost, on appeal to the Michigan Supreme Court, a trademark infringement case which ultimately turned on the question of abandonment. A proper decision, under the facts and the law, was made by the highest Court of the State. There was no decision on a federal question and it is not believed that such a question is now presented for this Court to even acquire jurisdiction.

Petitioner had its day in Court, in full accord with all applicable rules, and was not in any way denied the procedures of due process, having had an opportunity to fully present its case. The decision on the merits of the case was not erroneous and was in accord with applicable decisions.

There are no special or important reasons for granting the writ (Rule 19).

### I. Petitioner's Due Process Rights Were Not Violated by Procedure Followed by the Michigan Supreme Court in Deciding the Issues on Appeal.

In view of the argument presented by Petitioner, it is illuminating to read in their entirety, *in sequential context,* the rules under attack. Specifically they are as follows:

> "Rule 853 Appeals from Decisions of Court of Appeals.
>
> .1 Grounds. Appeal may be taken to the Supreme Court only upon application and leave granted, in the discretion of the Supreme Court, from any

decision of the Court of Appeals, interlocutory or final, upon a showing of a meritorious basis for appeal and any one of the following grounds.

(1) The subject matter of the appeal involves legal principles of major significance to the jurisprudence of the State.

(2) The decision of the Court of Appeals is clearly erroneous and will cause material injustice.

(3) The decision is in conflict with decisions of the Supreme Court or other Court of Appeals decisions.

(4) In any appeal of an interlocutory order of the Court of Appeals, it must be shown that appellant would suffer substantial harm by awaiting final judgment before taking appeal.

.2 Application for Leave To Appeal.

(1) Application for leave to appeal to the Supreme Court shall be filed with the clerk of the Supreme Court within 20 days after mailing by clerk of the Court of Appeals of notice to counsel of entry of the order of the Court of Appeals or the denial of an application for rehearing timely filed. Application for leave to appeal and brief in support thereof shall be filed in form and manner and proceedings had thereon as provided in sub-rule 852.2. Each copy of the application for leave to appeal shall be accompanied by a copy of the opinion and order of the Court of Appeals and the opinion, order and finding of the trial court or other tribunal. The filing of a copy of an application for leave to appeal to the Supreme Court with the clerk of the Court of Appeals shall constitute notice to the clerk of the Court of



Appeals to forward to the clerk of the Supreme Court the record on file with the Court of Appeals. . . . . .

(3) Delayed application for leave to appeal may be filed upon a showing by affidavit of facts that the delay was not due to appellant's culpable negligence but no such application shall be filed later than six months after the decision of the Court of Appeals.

(4) Upon any application for leave to appeal, the court on its own motion or by stipulation of the parties, may in lieu of leave to appeal enter a final decision or issue an appropriate peremptory order."

Note that Rule 853.2(4) specifically provides that: "Upon *any* application for leave to appeal . . ."

Clearly this is intended to apply to either a "regular" application to appeal under Rule 853.2(1) or a delayed application for leave to appeal under Rule 853.2(3) for it follows, in sequence, both of said rules.

Note also that the rules provide for a brief in support of the leave to appeal, whether it be regular or delayed, and also provide for the Supreme Court to have before it the record on file with the Court of Appeals, as well as the opinions from all Courts below.

As heretofore pointed out, the Petitioner fully briefed all issues on appeal in a separate, twenty-five page brief filed *in addition* to its brief in opposition to Respondent's delayed application for leave to appeal.

Thus, all issues were fully briefed and presented to the Michigan Supreme Court, it had the benefit of the entire transcript of record below, including exhibits, as well as copies of the decisions below.

The Court considered the case from February to October of 1978 before reaching its decision. The Court

rules are clear and proper and the Court clearly had the discretion to proceed as it did.

There is no requirement in the Michigan General Court Rules for notice to be given that the Supreme Court is about to make a decision and, indeed, none is required. The Petitioner had fully presented its position to the Court and it was, as are all other Courts, permitted to make a ruling in its own time and at its discretion, pursuant to the Court's established rules.

The procedure which the Michigan Supreme Court may follow in a given case is clearly spelled out in the Rules and Petitioner was upon notice that such procedure was available. Further Petitioner should not have been surprised by the Court following the procedure of well defined Rule 853.2(4) for, as noted hereinabove, the Court had done so in many previous cases.

The right of State Courts to establish and follow rules of appellate procedure is well established. See *Wolfe v. North Carolina*, 364 U.S. 177 (1960) holding:

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon the questions of local or general law."

See also *John v. Paullin*, 231 U.S. 583 (1913).

Petitioner would also make much of the fact that no oral argument was called for by the Michigan Supreme Court, indicating this as a denial of due process. Such argument of Petitioner has no merit. See *Price v. John-*



*son*, 334 U.S. 266 (1948), enunciating the well settled rule that "oral argument is not an essential ingredient of due process." See also *Federal Communications Commission v. Station WJR*, 337 U.S. 265 (1949).

The fact that Petitioner was not given the opportunity to present oral argument did not deprive it of due process. This is particularly true when the Court had before it not only the entire record in the case, but also full briefs from both parties on all issues.

Thus, as all properly established procedural rules of the Michigan Supreme Court were fully followed, there can be no denial of due process to Petitioner.

**II. The Decision of the Michigan Supreme Court Was Proper in Reversing the Erroneous Decisions of the Lower Courts.**

With the complete record before it, including full briefs by both parties covering all issues involved, the Michigan Supreme Court, in a per curiam decision, found that Respondent had not in fact abandoned the trademark "HOL-SUM" in the Lansing area. This was an inevitable conclusion since both Courts below had found that Respondent was actually using the mark in the area. The Court correctly recognized that "To prove abandonment Way had to show by clear and convincing evidence that Interstate or its predecessor had ceased to use the 'HOLSUM' trademark with intent not to resume its use" and then concluded "The record indicates that Way failed to sustain its burden of proof and that the trial court's decision was clearly erroneous."

This conclusion is in accord with the facts and the law of Michigan as enunciated previously by its Supreme Court in *Saunders v. Stringer*, 265 Mich. 301, 251 NW 342 (1933) as follows:

"Abandonment must, however, be strictly proven where a forfeiture is claimed on that ground. The temporary disuse of a trade-name, or even the temporary use of an additional trade-name in connection with it, is not sufficient. It is necessary to show, not only acts indicating a practical abandonment, but an actual intent to abandon, since acts which, unexplained, would be sufficient to establish an abandonment may be answered by showing that there never was an intention to give up and relinquish the right claimed."

Having found no abandonment of its mark by Respondent, the Michigan Supreme Court also fully considered and disposed of the issue of alleged defensive use advanced by Petitioner, by correctly interpreting the case of *La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc.*, 495 F.2d 1265 (CA 2 1974) which had been relied upon by the Courts below as a basis for their decisions on the issue. The Supreme Court of Michigan properly recognized that the *Patou* case did not relate to the question of abandonment of a mark which had been in use, but rather dealt with the initial acquisition of a trademark. So saying, the Court disposed of the issue by concluding that: "Interstate had acquired the right to use the trademark in the Lansing area."

The conclusion of the Michigan Supreme Court was proper and is not contradicted by *United Drug Company v. Theodore Rectanus Company*, 248 U.S. 90 (1918) which also deals with the question of sufficient initial use of a trademark in a given territory to acquire rights to the mark and, as a matter of law, supports the position of the Court by holding "Undoubtedly, the general rule is that, as between conflicting claimants to the right to use of the same mark, priority of appropriation determines



the question"; or by *Morton Salt Company v. G. S. Suppiger Co.*, 314 U.S. 488 (1941) which is an irrelevant patent case involving an accounting for infringement of a patent and holding that the patentee had violated public policy in attempted enforcement of its patent.

The decision of the Michigan Supreme Court on the merits of the case was not erroneous, and even if it were, such would not admit Petitioner to this Court on the grounds of denial of due process. See *American Railway Express Co. v. Kentucky*, 273 U.S. 269 (1927) stating:

"Save in exceptional circumstances not now present we must accept as controlling the decision of the state courts upon questions of local law, both statutory and common. 'The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law.'

"It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law."

The decision of the Michigan Supreme Court was proper, took into consideration all relevant issues and did not, in any manner, deprive Petitioner of its rights under the law and the rules. As noted above and recognized by Petitioner in its Petition, this Court will not normally interfere with state court decisions (Pet. p. 16). There is nothing in the present case to justify this Court becoming involved in a State action for trademark infringement, which action has been fully and properly presented to, and decided by, the highest Court of the State involved.

## CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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